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U.S. SUPREME COURT, U. S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1944

No. **1283**

JERRY VOGEL MUSIC Co., INC.,

*Petitioner,*

against

FORSTER MUSIC PUBLISHERS, INC.,

*Respondent.*

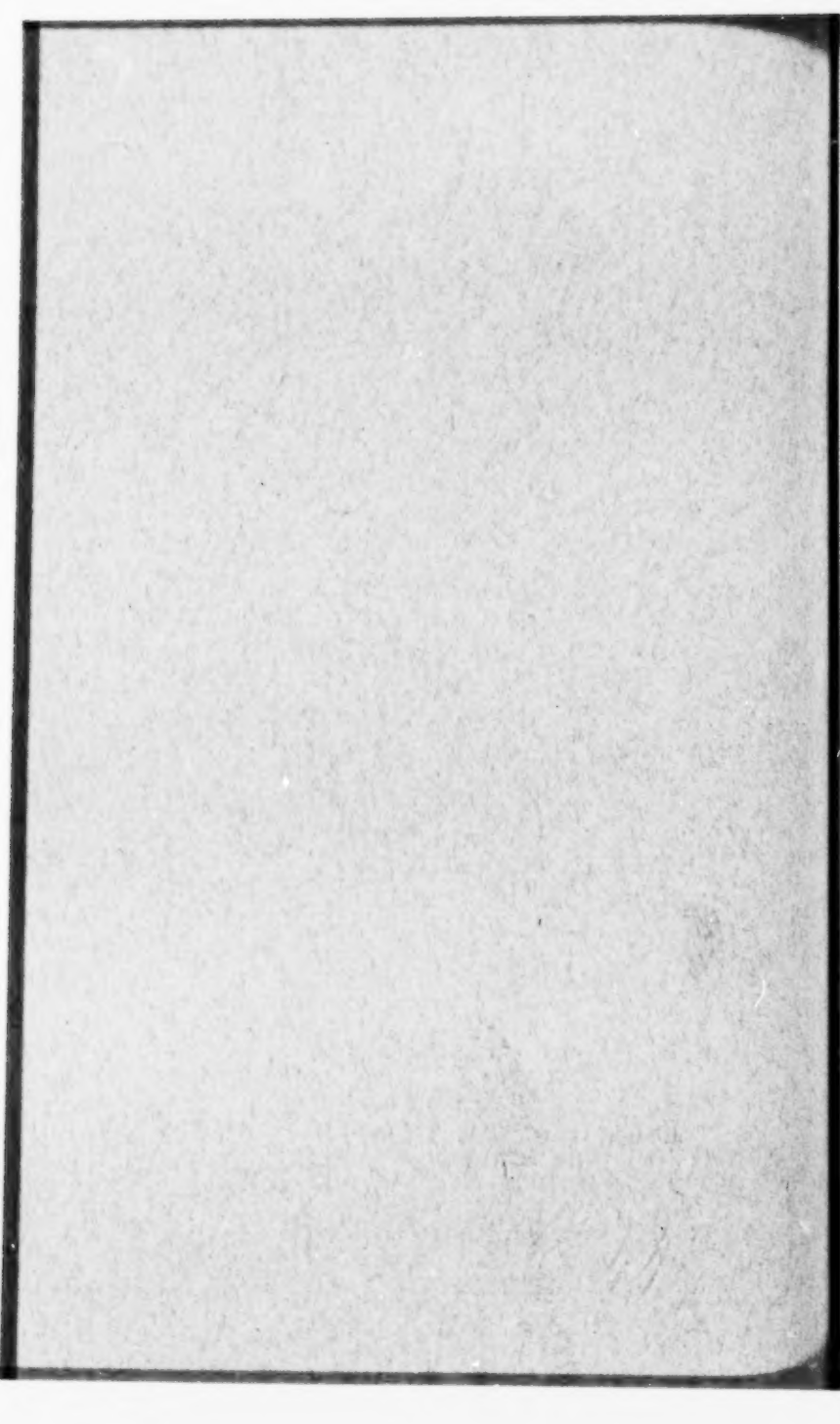
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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE SECOND CIRCUIT  
WITH SUPPORTING BRIEF

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ARTHUR F. DRISCOLL,  
*Solicitor for Petitioner.*

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WITH SUPPORTING BRIEF**

*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

Your petitioner, Jerry Vogel Music Co., Inc., after final judgment in the above cause, wherein petitioner was defendant and respondent was plaintiff, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case on March 19, 1945.

## I

**Summary Statement of Matter Involved.**

The action was begun March 13, 1939 by the filing of a complaint in the District Court, Southern District of New York (R. p. 2). It involves the ownership of copyright for the renewal term of the musical composition entitled "Down by the Old Mill Stream".

The plaintiff, a music publisher, sought a declaratory judgment, claiming sole ownership through assignment from the next of kin of one Tell Taylor, deceased, affirmatively alleging that Taylor had been the sole author, and that Earl K. Smith, assignor of defendant, was not a co-author.

The defendant, also a music publisher, entered its denial of the plaintiff's claim.

Thus, the case proceeded to trial with the issue of authorship being squarely presented, the plaintiff having the burden of proving under the pleadings, not only that Taylor was the sole author but that Smith was not a co-author.

The Trial Court concluded plaintiff was the owner of the renewal term of copyright, holding that Taylor had been the sole author; that Smith had never asserted a formal claim of co-authorship during the original term and therefore was barred from asserting a right to the renewal.

District Judge Mandelbaum's opinion appears at pages 111 to 115 of the record.

The Trial Court's judgment was affirmed by the United States Circuit Court for the Second Circuit, with opinion by Judge Simons, which appears at pages 123 to 128 of the record and is reported in 147 Fed. (2d) 614. A petition for rehearing was denied March 19, 1945.



## II

## Facts.

In 1910 Tell Taylor, a music publisher, registered in the Copyright Office a claim of copyright for the musical composition, which stated that the words and music were by Taylor, and that it was published by Star Music Publisher (R. Ex. 1).

Taylor simultaneously filed two printed copies of the original edition. There was printed on the music page of those copies the names of Earl K. Smith and Tell Taylor, as writers, not Taylor alone (R. Exs. A and B).

Smith's name was on the entire first edition. It was removed from the subsequent editions. There is no explanation in the record for such removal.

Taylor was the Star Music Publisher. He obtained the copyright, controlled the printing, and published the first edition. The printing of Smith's name as co-author therefore was an admission by Taylor that Smith was co-author.

Smith, as co-author, during the last year of the original term of copyright, filed a notice of renewal and extension. Two weeks later Taylor filed a notice of renewal and extension. Taylor died before the expiration of the last year of the original term.

Plaintiff, urging that under Section 55 of the Copyright Law the original copyright certificate was *prima facie* proof of sole authorship by Taylor, offered in evidence such certificate and rested its case. This certificate states (Ex. 1):

1. That two copies of the musical composition had been filed; and
2. That registration of a claim of copyright for the first term of 28 years had been made by Taylor—Words and Music by Tell Taylor.

Defendant, taking issue, contended: (a) That such certificate was only prima facie proof of the facts certified therein, namely, that two copies of the musical composition were filed in the Copyright Office, and that Taylor had registered a claim for copyright thereon; and (b) That the two filed copies of the musical composition as originally published were part of the copyright record, and as Smith's name was on such copies as co-author, they constituted a formal admission by Taylor that Smith was a co-author. Such admission met the plaintiff's prima facie proof and overcame any presumption of sole authorship by Taylor that might have arisen by the introduction of the original certificate of copyright, if as a matter of law the certificate carried such presumption.

Defendant called Smith to testify and his testimony was excluded under Section 347 of the New York Civil Practice Act, known as the "Dead Man's Statute".

### III

#### Statement of Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347(a)), and Section 23 of the Copyright Law (17 U. S. C., Sec. 23).

Cases believed to sustain the jurisdiction are:

*Fox Film Corp. v. Knowles*, 261 U. S. 326;  
*Witmark v. Fisher*, 318 U. S. 643.

## IV

**Questions Presented.**

The case presents important questions arising under the United States Copyright Law (17 U. S. C.) relating particularly to the renewal term of copyright as provided for by Section 23 of that law. These questions, arising in a suit purporting to be one for a declaratory judgment, are:

1. Whether or not, in determining ownership of the renewal term of copyright, the original certificate of copyright raises a presumption of authorship under Section 55 of the Copyright Law, or whether such certificate, in the words of that section, is merely prima facie proof of the facts certified or stated therein, namely, that (a) two copies of the work were filed, and (b) that registration of a claim of copyright for the first term on said work has been made.
2. Is an author properly barred from claiming ownership in the renewal term of copyright by reason of his failure to assert formal claim of ownership of the original term of copyright?
3. Can a co-author of a musical composition, in defending a claim that he is not a co-author, be prevented from testifying that he was such co-author and, therefore, entitled to share in the renewal term of copyright, by the assignee of the heirs of the other co-author invoking Section 347 of the New York State Civil Practice Act, known as the so-called "Dead Man's Statute"?
4. If the original certificate of copyright, containing the unsworn statement of Taylor (since deceased) that he was author of the musical composition, is accepted as prima facie evidence of his sole authorship, does

such acceptance waive the incompetency of the other co-author to testify under Section 347 of the New York State Civil Practice Act?

## V

### Reasons for Granting the Writ.

Petitioner urges the following reasons for granting the writ of certiorari:

1. The decision below is of the utmost importance to the music publishing business.

2. It places the burden upon a surviving co-author of establishing that he is a co-author, while at the same time, in the event that the plaintiff has taken title from a co-author now deceased, it gags the survivor under Section 347 of the New York State Civil Practice Act.

3. It accepts as equivalent to testimony by the deceased an unsworn claim by him to sole authorship, yet it fails to consider such acceptance as a waiver of the incompetency of the co-author to testify under the provisions of Section 347 of the New York State Civil Practice Act.

4. It is authority for the proposition that an author cannot assert claim to the renewal term of copyright unless he had an established right to the original term of copyright. It is respectfully submitted that the purpose and intent of the Congress in framing the Copyright Law was to preserve to the author a right to secure the renewal or extended term regardless of whether or not he had any interest in the original term of copyright.

5. It gives to the copyright certificate the status of prima facie evidence not only of the facts certified therein as per the provisions of Section 55 of the Copyright Act, but also

prima facie evidence as to facts stated by a fellow co-author even though not under oath or substantiated by official seal.

That the above are true is borne out by a circular issued by the Music Publishers' Protective Association, Inc., to all its members under date of February 27, 1945.

The importance of this decision to the music publishing industry and to the writers of popular songs is well illustrated by the said circular, which refers entirely to the decision in this case. It opens with the following statement:

"Mr. Julian Abeles, counsel for the appellee, kindly furnished us with the following explanatory memorandum:"

There then follows three pages of quotation of the memorandum furnished by counsel for the plaintiff below. Among other things, Mr. Abeles says:

"A decision of utmost importance to the music publishing companies which were acquired in recent years by new interests, has just been handed down by the Circuit Court of Appeals in the 'Down by the Old Mill Stream' case."

He also says:

"In the 'Mill Stream' case Forster Music Publisher, Inc. had acquired the renewal copyright from Tell Taylor as the sole writer. Earl K. Smith, who claimed to be a co-writer, had likewise had a renewal registered in his name and assigned the renewal rights to Jerry Vogel Music Co. Inc. Forster, through his attorney, Julian T. Abeles, brought an action in the New York District Court, in which it asked the Court to declare that it was the sole owner of the renewal rights."

Mr. Abeles then details the establishing of a prima facie case by offering the certificate of copyright and the blocking of Smith's testimony by invoking the "Dead Man's Statute". He says:

"While the original copyright certificate stated that Taylor was the sole author, printed copies of the song which were filed in Washington and sold, bore the name of Smith as the co-writer with Taylor."

Mr. Abeles' next sentence is very illuminating:

"Taylor having died, Forster was in the unfortunate position of being unable to explain why Smith's name had been placed on the copies if he was not a co-writer."

Mr. Abeles then explains how he met the situation:

"Abeles was accordingly obliged to rest his case upon the copyright certificate as evidencing Taylor as the sole writer. When Smith took the stand to testify that he had written the song with Taylor, Abeles, by a surprise move, objected to the testimony upon the ground that as Taylor had died Smith could not testify to any personal transaction that he had with Taylor. Abeles relied upon what is known as the New York 'Dead-Man's Statute', which prohibits any person claiming an interest adverse to an estate from testifying to a transaction with the decedent."

A very significant part of Mr. Abeles' statement is to the effect that the decision of the Circuit Court of Appeals has construed the law to be that an author has no right to the renewal term unless he had rights under the original copyright. Mr. Abeles said:

"As to Vogel's further contention, that while Smith might be precluded from asserting any claim to the original copyright this would not defeat his renewal right as co-author, the Circuit Court said that Smith's renewal right depended upon his rights under the original copyright, and that as he had not established his right to the original term he had no authority to obtain a renewal certificate."

And Mr. Abeles concludes with the following:

"The 'Mill Stream' decision has blasted the bonanza of such claimants, in cases where one of the writers

has died. The publisher will now be in a position, as in the 'Mill Stream' case, to introduce the original copyright certificate in evidence, and the claimant will be prohibited from offering his testimony as to his alleged co-authorship. This will greatly curtail the prevalent division of renewals of many of the famous songs that have endured, and will mean a substantial saving to the original publishers."

The decision of the Circuit Court of Appeals is untenable, contrary to and inconsistent with the Copyright Act of 1909 and in complete disregard of the issues presented in this case.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the will of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as this Court may deem proper.

Dated, New York, N. Y., May 12, 1945.

JERRY VOGEL MUSIC Co., INC.,  
 Petitioner,  
 By JERRY VOGEL,  
 President.

ARTHUR F. DRISCOLL,  
 Solicitor for Petitioner.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

JERRY VOGEL, being duly sworn, deposes and says:

That I am President of Jerry Vogel Music Co., Inc., the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

JERRY VOGEL.

Sworn to before me this  
12th day of May, 1945.

MILTON M. ROSENBLUM, Notary Public  
Queens Co. Clerk's No. 654, Reg. No. 184-B-6  
Bronx Co. Clerk's No. 75, Reg. No. 138-B-6  
New York Co. Clerk's No. 99, Reg. No. 245-B-6  
Kings Co. Clerk's No. 175, Reg. No. 287-B-6  
Commission Expires March 30, 1948



